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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

ZENITH GILLIAM,

Defendant and Appellant.

C062087

(Super. Ct. No.
08F04519)

A jury convicted defendant Zenith Gilliam of assault with a deadly weapon, to wit, a knife, and found a great bodily injury allegation to be true. The jury deadlocked on an attempted murder count upon which the court declared a mistrial and later dismissed on the prosecutor's motion. The trial court found three strike priors and prior serious felony conviction allegations to be true.

After denying defendant's motion to dismiss the strike priors, the trial court sentenced defendant to state prison for 25 years to life plus three years for the great bodily injury

enhancement and five years for a prior serious felony conviction.

On appeal, defendant contends that the trial court abused its discretion in refusing to strike the strike priors. We reject defendant's contention and affirm the judgment.

FACTS

On May 26, 2008, Branko Majstoric was visiting Crystal Winters in her apartment when defendant entered. Winters believed she saw defendant fold and put a black-handled knife in his pocket. Winters demanded to know why defendant had just walked into her apartment. Defendant told her to shut up. Majstoric intervened verbally and exchanged words with defendant. They agreed to go outside where they continued to argue. Defendant punched Majstoric four or five times. Majstoric ran away but returned, yelling that he had been stabbed by defendant. Majstoric sustained three stab wounds on his upper body.

With respect to defendant's strike priors, the record reflects the following. In 1993, defendant got into an argument with people at an apartment and left, warning that he would return with guns. He returned to the apartment armed with a nine-millimeter semiautomatic assault weapon and entered victim #1's apartment. He fired two or three times at victim #2, turned and walked to the kitchen where he shot victim #3 six times. He then shot once down the hallway at victim #2 and then left. Defendant was convicted of attempted murder, assault with a firearm, and first degree burglary with firearm and great

bodily injury enhancements and was sentenced to state prison for an aggregate term of 18 years. Defendant was paroled in 2005. He returned to custody on a parole violation in 2007, and was released on parole again in January 2008. He was on parole when he committed the current offense.

Defendant's history includes juvenile adjudications for cruelty to animals when he was 15 years of age and assault with a firearm when he was 17 years of age. Besides defendant's strike priors, his adult record includes misdemeanors for carrying a concealed weapon (1989), possession of burglar tools (1990), and vehicle theft (1993).

Defendant was unemployed at the time of the current offense but he claimed he had previously worked in several professions. Defendant denied the use of any controlled substances and claimed to be in excellent health except for suffering from asthma. He was an admitted gang member and classified as such but denied being an active member. During the pendency of the current case, defendant was written up for bad jail behavior and received five days of restriction.

Defendant filed a motion to dismiss his strike priors, arguing that his convictions arose from a single incident at a single location and should be considered as one strike, not three, citing a line of cases. He also argued 25 years to life would be excessive in view of the facts of the current offense and his misdemeanor criminal history.

In denying defendant's motion, the court stated that it had found the line of cases defendant cited to be inapplicable.

Based on defendant's prior criminal history, his commitment to state prison, his parole violations, and his current offense, the court declined to strike any priors.

DISCUSSION

Defendant appears to contend the trial court abused its discretion by failing either to strike one or two of his prior convictions because his three prior strikes were so closely connected as to constitute a single unlawful incident. He further seems to claim his potential punishment as a two-strike or, perhaps, as a one-strike offender would have been sufficient. Finally, he asserts his record was not otherwise particularly significant.¹ We find no abuse.

A trial court may, in the furtherance of justice, strike a strike prior for purposes of sentencing, "subject, however, to strict compliance with the provisions of [Penal Code] section 1385 and to review for abuse of discretion." (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 504.) And a trial court's "failure to dismiss or strike a prior conviction allegation is subject to review under the deferential abuse of discretion standard." (*People v. Carmony* (2004) 33 Cal.4th 367, 374 (*Carmony*).)

¹ Defendant's briefing is ambiguous as to whether to treat him as a single or double striker, rather than a triple striker. To treat him as a double striker would be a futile act because his sentence would remain unchanged. Only by treating him as a single striker does his briefing make any sense.

In determining whether to strike a strike prior, the trial court "must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

"[T]he three strikes law not only establishes a sentencing norm, it carefully circumscribes the trial court's power to depart from this norm and requires the court to explicitly justify its decision to do so. In doing so, the law creates a strong presumption that any sentence that conforms to these sentencing norms is both rational and proper." (*Carmony, supra*, 33 Cal.4th at p. 378.) This presumption will be rebutted only in an "extraordinary case -- where the relevant factors described in *Williams, supra*, 17 Cal.4th 148, manifestly support the striking of a prior conviction and no reasonable minds could differ" (*Carmony, supra*, 33 Cal.4th at p. 378.) Where the trial court, aware of its discretion, "'balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance' [citation]." (*Ibid.*)

People v. Benson (1998) 18 Cal.4th 24 (*Benson*) held that "a qualifying prior conviction [may] be treated as a strike even if

the sentence on the conviction has been stayed pursuant to the provisions of [Penal Code] section 654." (*Benson, supra*, at p. 36.) *Benson* noted in dicta: "Because the proper exercise of a trial court's discretion under [Penal Code] section 1385 necessarily relates to the circumstances of a particular defendant's current and past criminal conduct, we need not and do not determine whether there are some circumstances in which two prior felony convictions are so closely connected -- for example, when multiple convictions arise out of a single act by the defendant as distinguished from multiple acts committed in an indivisible course of conduct -- that a trial court would abuse its discretion under [Penal Code] section 1385 if it failed to strike one of the priors." (*Benson, supra*, 18 Cal.4th at p. 36, fn. 8.)

People v. Burgos (2004) 117 Cal.App.4th 1209 (*Burgos*) held the trial court abused its discretion in failing to strike one of two strike priors, citing the dicta in *Benson*. (*Id.* at pp. 1214-1215.) In *Burgos*, a jury convicted the defendant of second degree robbery and assault by means of force likely to produce great bodily injury. The defendant admitted two strike priors, one for attempted carjacking and the other for attempted robbery. (*Id.* at pp. 1211-1212.) The facts and circumstances underlying the strike priors reflected that the defendant "and two companions approached a man at a gas station and [the defendant] demanded the victim's car while one of the companions told the victim that he had a gun." (*Id.* at p. 1212, fn. 3.) The trial court denied the defendant's request to strike one of

the strike priors. (*Id.* at p. 1212.) *Burgos* reversed, concluding that the defendant's "strike priors arose from a single criminal act. His criminal history aside from the strike convictions consisted of misdemeanors, including a juvenile finding of battery on his sister and adult convictions of interference with a bus driver, unruly behavior at a bus terminal, and littering, and of one felony conviction for sale of a substance in lieu of a controlled substance While the current offenses were not merely petty theft or drug possession offenses, neither were they, under the circumstances, the worst of crimes." (*Id.* at p. 1216.)

Burgos is distinguishable. Defendant's three strike priors arose from an incident in which he shot two victims during a burglary of a home belonging to a third victim. Unlike the facts in *Burgos* which reflected a single victim, the facts underlying defendant's priors reflects multiple acts and involved three separate victims. For the same reason, defendant's reliance upon *People v. Sanchez* (2001) 24 Cal.4th 983 at pages 992 to 993 is misplaced [the defendant was convicted of gross vehicular manslaughter while intoxicated and murder, one act upon the same victim].

As to whether punishment as a one-strike or two-strike offender was sufficient and whether defendant's record was significant, arguments defendant made below and renews on appeal, these issues were for the trial court's determination, considering all relevant factors. The now 40-year-old defendant began violating the law at 15 years of age. His misdemeanor

conduct as an adult included carrying a concealed weapon, possessing burglar tools and vehicle theft. He graduated quickly to felony conduct, committing the offenses underlying the strike priors when he was 23 years of age. Upon release, he violated parole and returned to custody. He was released again on parole and committed the current offense. The court stated that it had considered the line of cases cited for the proposition that all strike priors should be treated as one but rejected the argument and rightly so. In declining to strike any strike priors, the court considered defendant's history of offenses, parole violations and the facts underlying the current offense. Thus, the trial court rejected defendant's arguments that punishment as a two-strike offender was sufficient and that defendant's record was not significant. We find no abuse of discretion.

Even assuming that the strike priors were closely connected to support the trial court's decision to strike one, it would be an abuse of discretion to do so where it cannot be said that the defendant falls outside the spirit of the "Three Strikes" law. (See *People v. Scott* (2009) 179 Cal.App.4th 920, 931, original italics ["the 'same act' circumstances . . . provide a factor for a trial court to consider, but do not *mandate* striking a strike"].) The facts underlying defendant's strike priors and his current convictions do not demonstrate that defendant is outside the spirit of the Three Strikes law. Defendant's strike priors involved facts similar to the facts underlying the current offense, the differences being defendant's choice of

weapon and the number of victims. Further, defendant's background, character, and prospects do not support a finding that he is outside the spirit of the Three Strikes law.

DISPOSITION

The judgment is affirmed.²

NICHOLSON, Acting P. J.

We concur:

RAYE, J.

CANTIL-SAKAUYE, J.

² The recent amendments to Penal Code section 4019 do not operate to modify defendant's entitlement to credit, as he was committed for a violent felony and had prior convictions for serious and violent felonies. (Pen. Code, § 4019, subds. (b), (c); Stats. 2009-2010, 3rd. Ex. Sess. ch. 28, § 50.)